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**THE JUDICIALISATION OF INTERNATIONAL LAW: REFLECTIONS ON THE EMPIRICAL TURN**

Karen J Alter. *The New Terrain of International Law: Courts, Politics, Rights*. Princeton, Princeton University Press, 2014. Pp. 450 + xxiii. £65.00. ISBN: 9780691154749

Cesare PR Romano, Karen J Alter, and Yuval Shany (eds). *The Oxford Handbook of International Adjudication*. Oxford, Oxford University Press, 2014. Pp. 975 + xcii. £125.00. ISBN: 9780199660681.

Yuval Shany. *Assessing the Effectiveness of International Courts*. Oxford: Oxford University Press, 2014. Pp. 322 + xix. £70.00. ISBN: 9780199643295.

Gleider I Hernández\*

**Abstract**

*The proliferation of international courts and tribunals in the last two decades has been an important new development in international law, and the three books under review are at the vanguard in substantiating the claim that the judicialisation of international law reflects its deepened legalisation. All three have adopted ambitious empirical frameworks through which to assess the impact of international courts, and present valuable insights with respect to the phenomenon. Whilst all seek to make intelligible the growing practice of the various international courts, their empirical methodology and mapping exercise reflects a faith that the legalisation/judicialisation of international law is a positive development, one that might nevertheless be contested. With the Oxford Handbook's mapping exercise, Karen Alter's 'altered politics' model of effectiveness, and Yuval Shany's 'goal-based' method for assessing effectiveness, the three books represent the forefront of scholarly efforts to cognise the practice of international courts. One should be careful, however: because the empirical exercise attempted in these three books goes beyond mere description into an attempt to model future outcomes, it has the drawback of privileging certain modes of cognising the phenomenon of the proliferation of international courts. Although an important contribution,*

*a solely empirical approach would create the impression of a purely linear progression in the judicialisation of international law, which might not be borne out in reality.*

## **1 Introduction**

Debates over the role of international courts and tribunals in the development of international law have percolated since the proliferation of such bodies in the period since 1990. The judicial settlement of international disputes, previously confined to certain specified fields and limited only to a small subset of actors, has spread into virtually all areas of common concern. Whether the inevitable by-product of an increasingly globalised form of governance or perhaps the very midwife of this phenomenon, the emergence of international courts and tribunals as influential normative actors in the development of international law is now firmly embedded in the global legal landscape.<sup>1</sup>

The three books under review are the culmination of more than a decade of coordinated efforts within the *Project on International Courts and Tribunals* network.<sup>2</sup> These efforts aimed to systematise and understand the impact of international courts on international law. Their conscious coordination is illustrated by the fact that both Alter and Shany, having each published a monograph on the topic, are also lead editors of the Oxford Handbook. Published in rapid succession at the start of 2014, the three books together represent the high point of these efforts towards systematisation, adopting a consciously empirical approach in their

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<sup>1</sup> The present author's own work has explored the theme, in relation to the International Court of Justice: see GI Hernández, *The International Court and the Judicial Function* (2014).

<sup>2</sup> As expressly recognised by Romano, Shany and Alter in the Oxford Handbook, at vii: both Romano and Shany are directors within the network, and Alter has been associated to the project for many years.

approach to international courts, which together have generated a wealth of findings. In many respects, these three books are a high-water mark in the turn to empiricism that has recently coloured international legal scholarship.

In this review I neither endorse nor contest the authors' empirical methodology adopted, but seek to engage with each book's approach. The fact that empirical methods not traditionally deployed in the international legal discipline are now being used poses no existential threat. Yet, to employ them effectively, one must proceed with some care. As with any method it is important to assess which findings the empirical approach privileges. This review essay, in the span of a few thousand words, cannot quibble with small methodological points in the findings of the authors, which cover the practice of nearly all currently-operating international courts. Instead, the overarching perspective adopted here seeks to identify the narrative by which the authors of the works under review justify the empirical turn. What have the authors sought to achieve by adopting this approach to their study of international courts? Do these methods in fact achieve what has been sought? Finally, does the empirical approach privilege certain outcomes in the assessment of how international courts participate in international legal processes?

## **2 Methodology**

In studying these volumes, one sees how a variety of seemingly divergent methodological approaches nevertheless share some commonalities of form and substance. The Oxford Handbook attempts to bring together its 40-odd individual chapters through a common focus on the phenomenon of 'international adjudication' writ large. Rather than concentrating on international judicial institutions per se, they in fact seek to broaden the focus to all bodies, whether permanent or impermanent, national or domestic, which participate in 'the broader trends toward international legalization and the judicialisation of

international relations’.<sup>3</sup> Such a broader perspective suggests that the phenomenon of international adjudication—or at the very least, commonalities in the practices of the various adjudicative bodies—is worthy of scholarly attention. The Oxford Handbook’s structure reflects this, with its first two Parts dedicated to a ‘mapping’ exercise, first taking the reader through a history of international adjudication and the acceleration of proliferation in the last decades, and canvassing the existing institutions and their various fields of competence. The four latter Parts are then structured around various themes that seek to systematise a range of cross-cutting issues: in relation to theoretical approaches (Part III); contemporary issues and challenges (Part IV); and key actors, extending beyond judges and parties but also to advocates and litigators, prosecutorial and defence teams in international criminal law, and even to the role of legal secretaries and registries (Part V). Finally, Part VI raises selected legal and procedural issues governing the topic, such as jurisdictional questions and inherent powers of international courts, the roles of third parties, experts and other fact-finders, and the remedies that a court can indicate. The approach taken in the Oxford Handbook is unusually taxonomic: it aspires to provide a comprehensive resource that describes the plethora of existing institutions and the debates that are associated with them, whilst simultaneously seeking to constitute itself as a repository of contemporary practice and challenges facing international adjudication. For this reason, it departs from the traditional style of legal scholarship in its generous use of tables in its annexes and a helpful and detailed pullout chart, presenting data on the world’s international courts in a manner redolent of the charts distributed by the National Geographic Society.

The monographs by Alter and Shany have a more specific focus. (“*Assessing the Effectiveness of International Courts*” by Yuval Shany can be counted as a monograph as Shany has written the first seven chapters himself and co-written the five case studies with

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<sup>3</sup> Oxford Handbook, Foreword, at ix.

other scholars.) Karen Alter's international relations and political science background informs her approach to international courts as active participants in developing the 'political resource' that is international law.<sup>4</sup> Her theoretical framework aims to situate and describe how international law is deployed within the practices and work of international courts and judges to secure a number of political objectives, especially those embedded in their own constitutive instruments; she puts forward what she calls her 'altered politics' framework, an empirical approach through which the influence of international courts is measured by their ability to influence politics so as to advance the political objectives already inscribed in the law.<sup>5</sup> This approach breaks from traditional legal scholarship as it seeks to situate judicial reasoning both within the political context, but suggests that a court's influence on relevant actors may be objectively identifiable. She then applies the altered politics framework to a wide array of some eighteen case studies, spanning virtually all areas in which international courts are engaged. Divided into chapters focussed around the 'roles' international courts may play—law enforcement, dispute settlement, administrative review and 'constitutional review'—the eighteen case studies are used primarily to illuminate how the dynamics of international courts play out in relation to what she calls their 'compliance constituencies', or the partners and supporters who together work to strengthen and support international courts and generate compliance with their decisions.<sup>6</sup> Alter's analysis aims above all at clarification of the field; through the mapping of these institutional practices from an external perspective, she seeks to reconstruct how international law is used by international courts in order to assess the political choices that animate and justify such usages, and the role of international courts in influencing these choices—in short, in altering politics.

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<sup>4</sup> Recognised expressly in Alter, at xvii.

<sup>5</sup> *Ibid.*, at 19-26, esp 24-5.

<sup>6</sup> *Ibid.*, at 20-1.

Yuval Shany's background assumptions are somewhat more easily reconcilable with the methods known to international lawyers, but equally focussed on creating a taxonomy through which to systematise the variegated practices of international courts. With his 'goal-based approach to effectiveness analysis' sketched out in Chapter 1, Shany seeks to challenge presumptions that international courts and tribunals automatically lead to a strengthening of the international legal order in which they operate; he favours an empirical approach to assess the effectiveness and impact of international courts and tribunals.<sup>7</sup> This is a difficult task for international lawyers: effectiveness in relation to what purposes? Effectiveness according to which standard? Shany in his conceptual 'goal-based framework', tries to move beyond classic yet unmeasurable criteria such as compliance, 'usage rate', and their normative impact on State behaviour. For him, effectiveness is a measure of the 'attainment of the mandate providers' goals',<sup>8</sup> understood both as the legal mandate that has been embodied in the constitutive instrument of an international court, as well as the 'normative expectations of their mandate providers', which 'often reflect plausible conceptions of generally shared socially desirable ends'.<sup>9</sup> His framework is then applied to a series of five case studies, each centred around a specific judicial institution. In these case studies each institution is carefully described and situated in relation to its practice.

Shany's goal-based approach, which emphasises the importance of mandate providers, is strikingly similar to Alter's description of international courts as beholden to the political choices embedded in the law and their own mandate. Yet there is an important distinction between Shany and Alter: where Alter seeks to *identify*, from an external viewpoint, the methods through which international law is deployed as a political resource, Shany seeks to

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<sup>7</sup> Shany, at 3.

<sup>8</sup> *Ibid.*, at 6-7.

<sup>9</sup> *Ibid.*

*evaluate* whether the practices of international courts conform to a pre-existing set of standards and goals already set out for international courts by their mandate providers, an essentially internal exercise. Taken as a pair for a moment, Shany and Alter's books are highly complementary, and serve to inform the more practical taxonomical exercise undertaken in the Oxford Handbook.

The underlying premise behind these books is a two-fold faith: that there is value in studying the body of practice being generated within international judicial fora; and that systematisation brings with it the possibility of making that body of practice intelligible, and with it, international law. To the extent that systematisation allows scholars to cognise and make sense of the world around them, there is surely value in seeking to situate the immense body of adjudicative practice within a system of knowledge. Yet equally so, an attempt to address and create knowledge through facts carries with it certain consequences, not least of which is that the choice to privilege certain facts in constructing a description is one that is inevitably value-laden.<sup>10</sup> The common thread found in these three books thus goes further than merely engaging in a mapping exercise as to the impact of these variegated practices. There are two specific normative convictions embedded within these three books: that international adjudication contributes, or at least has the potential to contribute, to the legalisation of international governance; and that this process of legalisation is, in the main, a positive development. It recognises the contribution of international courts to the development of international law,<sup>11</sup> yet seeks to go further and to measure and explain that contribution according to whether that change has been qualitatively for the 'better'. In so doing, the value-laden nature of the exercise takes it beyond mere description and adheres, to a point, to pre-existing standards or notions of justice which colour the analysis. In all three

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<sup>10</sup> See eg A Orford, 'In Praise of Description' (2012) 25 *Leiden Journal of International Law* 609, 624-5.

<sup>11</sup> See Alter, at 23-4, and Shany, at 6.



books, an attempt is made to suggest such standards of justice are internal to the work of international courts. Chapter 2 of Shany's book is particularly noteworthy in this regard. In this chapter he articulates a claim through which the ability of a court to mould its judgments so as to comply with the political wishes of mandate providers is the benchmark for the legitimacy and authority its judgments should command.<sup>12</sup>

One also can observe this conviction expressed in the sections which seek to trace a history of international adjudication. Mary Ellen O'Connell and Lenore VanderZee's contribution to the Oxford Handbook is essentially a narrative of progress, tracing various developments favouring the peaceful settlement of international disputes into the culmination of international courts vested with compulsory jurisdiction and with the competence to hear claims from a variety of non-State actors.<sup>13</sup> Their primary concern with the present system rests primarily with the proliferation of international tribunals, and the fact that they may be too effective, leading to the fragmentation of the law.<sup>14</sup> Alter's world history of international courts, which seeks in turn to trace the emergence of international courts back to key historical events which sparked 'bottom-up demands' to 'make governments and legislatures open to accepting greater international judicial oversight', is not much different in its linearity.<sup>15</sup> Although her historical genealogy takes greater account of the political ideals and commitments of the creators of the various international courts, the sheer breadth of the courts surveyed makes much of it perfunctory, situating the judicialisation of international

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<sup>12</sup> Shany, at 31 *et seq.* One finds a similar approach in Alter's 'altered politics' framework, sketched out at 19-26. The concern about the legitimacy of judicial law-making is equally present in the Oxford Handbook: see JE Álvarez, 'The Main Functions of International Adjudication', at 172-3; A von Bogdandy and I Venzke, at 510-11; and S Besson, at 421-2.

<sup>13</sup> O'Connell and VanderZee, in Oxford Handbook, at 56-7. Their analysis depends in particular on Hans Kelsen's demand for a competent court, with compulsory jurisdiction, as an indispensable 'core' for any future world organization: see H Kelsen, *Law and Peace in International Relations* (1942), at 151-2.

<sup>14</sup> O'Connell and VanderZee, *ibid.*, at 41.

<sup>15</sup> Alter, at 112.

law primarily as a historical phenomenon that was motivated by a discrete set of factual circumstances<sup>16</sup>. This atomistic approach leads one to presume the value of legalism, without fully understanding the discourses and patterns which lead to its widespread acceptance on the international plane. Fortunately, Alter correctly identifies the modesty of her own approach, calling for a fuller account of local histories and mulling over the continued resistance to the international rule of law.<sup>17</sup> Committed to the international rule of law as being amongst ‘goals inscribed in international law’,<sup>18</sup> she nevertheless displays an ambivalence about how those goals will continue to be pursued in the future.

This review essay cannot, in the limited space available, challenge meaningfully this value-laden approach; in many respects, the very topic of studying international adjudication in this empirical form presumes, if not demands, that a commitment be made as to the value of international adjudication. Instead, more interesting is to outline the themes surveyed in the various books as they proceed through their various case studies. These themes, which centre primarily around the relevant actors, questions of compliance and effectiveness, and the overarching theme of institutional and systemic legitimacy, are the first step in attempting to identify the motives underlying the remarkable systematisation efforts contained in these three books.

### **3 Common Questions**

#### **A. Relevant Actors**

It is hardly surprising that three books dedicated to mapping the phenomenon of international adjudication concentrate on ascertaining the relevant actors. In the introductory

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<sup>16</sup> This is especially evident in Alter’s account of the diverging approaches of Europe and the United States to the proliferation of international courts in the last two decades: *ibid.*, at 157.

<sup>17</sup> *Ibid.*, at 160.

<sup>18</sup> *Ibid.*

chapter of the Oxford Handbook, co-authored by Cesare Romano, alongside Alter and Shany, ruminations as to the distinction between judicial and arbitral bodies demonstrate the difficulty in making operative that distinction for the mapping exercise; hence, they choose to make no distinction between them.<sup>19</sup> Accordingly, the Handbook adopts a very broad approach: from the Permanent Court of Arbitration, institutional precursor to the ICJ and indirectly to other international courts (Mary Ellen O’Connell, Chapter 3), it goes beyond the permanent courts dedicated to inter-State disputes (Sean D Murphy, Chapter 9), the international criminal courts (William Schabas, Chapter 10) and the international human rights courts (Solomon T Ebobrah, Chapter 11), all the way to the investment tribunals constituted under the ICSID Convention (Christoph Schreuer, Chapter 14); and temporary international claims and compensation bodies such as the Iran-United States Claims Tribunal and the United Nations Compensation Commission (David Caron, Chapter 13).

Alter takes a similarly expansive approach in her definition of ‘new-style’ international courts, through which she has sought to identify a trend away from ‘old-style’ courts, lacking in compulsory jurisdiction, with competence only over State-to-State disputes, and acting in relative isolation from other international courts and domestic courts.<sup>20</sup> To her mind, ‘new-style’ international courts depart from old-style courts in many or all of these respects, being vested with compulsory jurisdiction, allowing for access for non-State actors (be they prosecutorial bodies, private litigants, or international organisations/organs thereof), and even the possibility of initiating proceedings for the review of a domestic court decision.<sup>21</sup>

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<sup>19</sup> Romano, Alter and Shany, in Oxford Handbook, at 9-10.

<sup>20</sup> Alter, at 81-82; she later develops the practice of so-called ‘old-style’ courts in Chapter 5.

<sup>21</sup> *Ibid.*, at 82-83. At 84, she has prepared a chart of the 24 courts she has used in her case study, which are categorised according to the extent to which they conform with her ‘new-style’ framework.

There is a deliberate under-emphasis of traditional international courts like the ICJ, in favour of the ‘new-style’ international courts, in both these books.<sup>22</sup> Shany points out that the ICJ’s ability to command compliance enjoys only limited success according to traditional, causation-based analyses. However, with his goal based approach he favours a more contextual analysis as (although the Court generally focuses on the settlement of the disputes before it) the ICJ has contributed to the legitimisation of the international legal regime of which it plays a part, in a manner which traditional compliance measures cannot account for.<sup>23</sup> As Alter would put it, this is a limited contribution, due to the fact that the ICJ is the most old-style of all international courts, with weak enforcement mechanisms, lacking compulsory jurisdiction, and only a limited capacity to affect compliance with its decisions. Perhaps for this reason, Alter only elects to study one of its cases, the territorial dispute between Qatar and Bahrain, suggesting that the ICJ may have a limited ability to contribute politically to the resolution of international disputes,<sup>24</sup> and that its ability to induce compliance falls short of the wider array of methods associated to ‘new-style’ international courts, vested with compulsory jurisdiction, stronger enforcement mechanisms, and with a wider competence than merely State-to-State disputes.

What makes this choice of emphasis problematic is that it overstates the extent of the judicialisation of international law as a matter of fact. Most of Alter’s ‘new-style’ international courts are smaller, regional institutions with very limited subject-matter competence; as Nico Krisch pointed out in a brief online comment on Alter’s book, most of these smaller actors operate only within limited geographical spaces (primarily Europe and

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<sup>22</sup> It is true that the topic was covered in 2004 by C Schulze, *Compliance at the International Court of Justice* (2004), primarily in relation to a close analysis of all the Court’s cases to that date.

<sup>23</sup> Shany, at 185-7.

<sup>24</sup> Alter, at 177.

Latin America), and within three limited issue areas (economic regulation, human rights and mass atrocities), leading to his metaphor of ‘islands’ of judicialisation, which is rather different than Alter’s linear narrative of a bottom-up process of judicialisation.<sup>25</sup> The Oxford Handbook is similar in its scope, but that is to be expected, given its emphasis on mapping and not merely on impact.

This choice to emphasise breadth of scope, if taken purely at face value, does present a narrative of progressive judicialisation that should always remain in the background of the careful reader’s mind when studying these books. It is somewhat compensated by Shany’s more restrained selection of case studies, confined to studying the effectiveness of five permanent institutions (the ICJ, the WTO Dispute Settlement System, the ICC, the European Court of Human Rights, and the Court of Justice of the European Union). Yet despite the differing approaches, Shany and Alter share much and in fact build on one another’s frameworks: to use but one example, Shany’s effectiveness analysis, as employed in the last chapters of his book, presumes that the features which characterise Alter’s ‘new-style’ courts equally contribute to the legitimacy and effectiveness of the various international courts.

An interesting side observation is given in André Nollkaemper’s piece in the Oxford Handbook, where he situates the engagement of domestic courts with international law within the wider phenomenon of international adjudication.<sup>26</sup> His account is essentially interactional; it is not merely that national courts engage with international law, but rather, that despite diverging normative and systemic foundations, the two categories of courts can interact with one another, complementing each other’s functions, in particular when domestic courts exercise enforcement and implementation functions that may be lacking on the international

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<sup>25</sup> This point was taken up in N Krisch, ‘The Path of Judicialization: A Comment on Karen Alter’s *The New Terrain of International Law*’, posted to EJIL:Talk on 23 April 2014 (available at <http://www.ejiltalk.org/the-path-of-judicialization-a-comment-on-karen-alters-the-new-terrain-of-international-law/>).

<sup>26</sup> Nollkaemper, in Oxford Handbook, at 525.

level. Conversely, international courts are strongest in respect of ‘normative development’, systematising practice and the decisions of national courts (and of States), identifying new international legal norms, and even occasionally serving to review (albeit indirectly) the decisions of national courts.<sup>27</sup> This interactional account has some purchase when one takes into account the lack of institutional or systemic hierarchy in the international legal system.

Courts do not exist in a vacuum: beyond the States that may have constituted them and who act as Shany’s mandate providers, international courts also form part of what Stanley Fish called ‘interpretive communities’<sup>28</sup> in which their ability to command authority demands that they comply with a certain vision of the system that they inhabit. The Oxford Handbook identifies a number of these constituencies within these interpretive communities whose professional engagement with international courts is direct, and who enjoy indirect legitimacy: other international judges and arbitrators, not in their institutionalised capacity but as individuals (Swigart and Terris, Chapter 28); the so-called ‘international bar’ of international law practitioners (Stoeger and Wood, Chapter 29, and Vauchez, Chapter 30); and prosecutors and defence counsel (Heller, Chapter 31, and Gibson, Chapter 32). The common thread in all these chapters is the emphasis on what Oscar Schachter called the ‘invisible college of international lawyers’,<sup>29</sup> a community of scholars purportedly bound together by a common cause of international justice and the preservation of law in

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<sup>27</sup> Nollkaemper, in Oxford Handbook, at 542-3. A high-profile recent decision of an international court that essentially served to review and reject the decision of a national court is the ICJ’s 2012 judgment in *Jurisdictional Immunities of the State (Germany v Italy)*, *Judgment*, *ICJ Reports 2012*, p. 99, where the ICJ, ruling on the same subject matter as the Italian Court of Cassation, declared that the latter court had erred in its interpretation of international law, and that Germany had suffered direct injury from the law breach of international law occasioned by that error.

<sup>28</sup> A concept famously elaborated in S Fish, ‘Interpreting the Variorum’, in S Fish, *Is there a Text in this Class? The Authority of Interpretive Communities* (1980), at 147-72.

<sup>29</sup> O Schachter, ‘The Invisible College of International Lawyers’ (1977) 2 *Northwestern University Law Review* 72.

international society.<sup>30</sup> Even the roles of the prosecutor and defence counsel are given systemic importance, their independence and accountability serving to buttress the legitimacy of the wider system of international criminal justice.<sup>31</sup> Such a conception of international courts as accountable to a wider community is strikingly similar to Alter's concept of 'compliance constituencies', discussed above, and plays an important role in securing judgment-compliance in Shany's goal-based framework. But that sense of inter-dependence, and even of inter-changeability<sup>32</sup> between the different practice communities also has a darker side; it suggests a group of elites who dominate the form and procedures of international adjudication, imposing their substantive preferences on the community, and even serving to exclude other actors who might contest the linearity and legalisation of the international legal order.

## **B. Compliance and Effectiveness**

International adjudicative processes cannot be understood merely through an analysis of the interaction of international courts with one another. The parties appearing before them, and the degree to which they are prepared to comply with the decisions of international courts, play a key role. All three books favour an empirical approach in ascertaining compliance: in the Oxford Handbook, Alexandra Huneus (Chapter 20) suggests that assessing judgment compliance is an essentially relational exercise. Huneus describes this assessment exercise as requiring one to establish a causal link between what the ruling

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<sup>30</sup> Swigart and Terris, in Oxford Handbook, at 637; Sthoeger and Wood, in Oxford Handbook, at 652; Vauchez, in Oxford Handbook, at 660.

<sup>31</sup> Heller, in Oxford Handbook, at 689; Gibson, in Oxford Handbook, at 694.

<sup>32</sup> The point that international judges often are elected after a period of practice in another capacity, be it advocate, State counsel or legal secretary is not lost: see Swigart and Terris, in Oxford Handbook, at 628-9; and Cartier and Hoss, in Oxford Handbook, at 725. The fact that already the international community of practitioners is equally restricted and elite (Sthoeger and Wood, in Oxford Handbook, at 647) would further compound the lack of accessibility.

demands and the behaviour of the parties subject to that ruling,<sup>33</sup> and suggests further study in this area. Shany and Alter do not adopt such a relational perspective. Shany suggests that a number of operational categories can help to measure effectiveness in relation to international courts: whether the tangible or intangible resources or assets available to the organisation actually enable it to meet its objectives (structural); whether the organisational processes sufficiently facilitate the aims of the organisation (process); and whether the outputs and their social effects are in conformity with the organisation's goals (outcomes).<sup>34</sup> The goal-based approach contextualises any analysis of compliance, departing substantially from an essentially dispute-centric approach; although Shany recognises the relative ease with which such compliance can be assessed, he suggests that instead, judgment-compliance ought to be understood in a broader, contextual sense, in line with the 'goal-based approach', and also address the impact on the practices of third parties.<sup>35</sup> Alter's concept of 'compliance constituencies' is again apposite: she suggests that more important than the behaviour of the parties themselves are the reactions of other governments, judges and relevant actors to the ruling of a court.<sup>36</sup> If the ruling of an international court has the potential to shift the legal landscape and modify the manner in which a legal rule or norm is perceived, the normative authority commanded by that institution is systemic, and not merely situated within the four corners of a dispute. This relatively functionalist understanding of authority differs from the democratic justification that Armin von Bogdandy and Ingo Venzke invoke to justify the international public authority begun commanded by international courts.<sup>37</sup>

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<sup>33</sup> Huneeus, in Oxford Handbook, at 443.

<sup>34</sup> Shany, at 50.

<sup>35</sup> *Ibid.*, at 118-19.

<sup>36</sup> Alter, at 348-9.

<sup>37</sup> See eg A von Bogdandy and I Venzke, 'On the Democratic Legitimation of International Judicial Lawmaking' (2012) 12(5) *German Law Journal* 1341, at 1343.



With their case studies, Shany and Alter make an effort to implement this broader understanding of compliance and effectiveness in their analysis of the practice of international courts. Given the breadth of her approach, Alter has elected to focus on a few particular proceedings before a number of international courts; she distinguishes between the inter-State and the ‘private actor’ contexts. This distinction is key because, to Alter, inter-State disputes retain a strong flavour of arbitration between parties, where international courts tailor their legal findings to politically acceptable outcomes, and thus enhance their legitimacy through what is a quintessentially transactional approach.<sup>38</sup> Conversely, the private litigant-initiated dispute settlement systems, such as human rights courts and investment tribunals, seem to embody more limited means through which the various parties involved can control the proceedings and their relations with each other: in essence, a controlled legalisation within a wider political process.<sup>39</sup> Such private litigant-initiated mechanisms, for Alter, departs from the transactionalism of the inter-State approach and contributes to a general climate of legalisation.

### **C. Institutional Preservation and Legitimacy**

The temptation for institutional self-preservation within international courts is strong. Perhaps due to the relatively limited compliance mechanisms available to them, international courts have developed methods through which to safeguard their legitimacy and their systemic importance well beyond the confines of a given proceeding or dispute. Alter identifies the ‘multilateral adjudication model’, where international courts reshape international politics through the creation of new legal rules, primarily through interpretations that come to constrain other actors within that system, including States.<sup>40</sup> Shany captures the

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<sup>38</sup> Alter at 176.

<sup>39</sup> *Ibid.*, at 192.

<sup>40</sup> Alter, at 47.

phenomenon of self-preservation and extends it further, with the idea of ‘regime support’, through which international courts discharge their mission with a view not only to interpreting and applying legal rules in order to settle disputes, but equally with respect to the overarching regime in which they operate.<sup>41</sup> Such a systemic approach serves to legitimate both the judicial institution itself, but also public authority at the international level, with international courts tasked with securing the legitimacy of the international legal system itself.<sup>42</sup> This link between institutional self-preservation and system preservation seems borne out in the various case studies he undertakes, notably with respect to the practice of the International Court of Justice, the World Trade Organisation, and the various international criminal tribunals in operation.

A key point taken up by Alter in her assessment of regime support is what she calls ‘international constitutional review’. She considers whether international courts, when assessing the validity of law-creating acts, have been delegated a ‘constitutional review function’ in line with ‘higher order legal principles—usually the organization’s founding treaty and human rights obligations that are binding on the organization and its members’.<sup>43</sup> Again, one must be careful not to overstate the constitutional review function, as international courts with a constitutional review power are few in number. Only five are identified by Alter, all being regional courts situated within wider regional integration organisations, and most being modelled on the European Court of Justice.<sup>44</sup> Although in such organisations, regional courts can contribute to a political culture in which legislation and actions by States and governmental authorities can be brought to account, much as in the domestic law model,

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<sup>41</sup> Shany, at 43-4.

<sup>42</sup> *Ibid.*, at 45-6.

<sup>43</sup> Alter, at 286.

<sup>44</sup> Although the Caribbean Court of Justice is unique amongst these, as it can exercise constitutional review when it serves as an appellate body for national judicial rulings.

the relative lack of courts with such constitutional review powers on the international plane limits the utility of Alter's constitutional review argument, as it applies only to a very limited subset of international courts.

This does not suggest, however, that the international courts not vested with constitutional review powers cannot exercise legitimate authority. Several contributors to the Oxford Handbook have picked up on the strategies and techniques used by international courts to buttress their authority and that of the international legal system more broadly. Armin von Bogdandy and Ingo Venzke (Chapter 23) touch upon the adjudicative tendency to reinforce institutional authority through argument via precedent, which feeds into general legal discourse by establishing judicial decisions as authoritative reference points for later legal practice.<sup>45</sup> The point is also taken up by Samantha Besson (Chapter 19) and Mikael Rask Madsen (Chapter 18), both of whom essentially situate judicial law-making as a systemic process, one only tenable when understood by reference to a primary law-making authority and verified institutionally within a legal system, for example by assessing compliance by relevant actors.<sup>46</sup> This view is characterised by an emphasis on the stabilisation of normative expectations and the contribution of international courts to the structural functioning of the system.<sup>47</sup> In this respect, the legitimacy of the court and the legitimacy of the system seem to go hand in hand.

The link between the legitimacy of a court and the system in which it operates extends also to the legitimisation function of international courts, to confer legitimacy on the norms and institutions that constitute the regime in which they operate.<sup>48</sup> Such legitimacy is linked

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<sup>45</sup> Von Bogdandy and Venzke, in Oxford Handbook, at 508.

<sup>46</sup> Besson, in Oxford Handbook, at 421-22; Rask Madsen, in Oxford Handbook, at 396.

<sup>47</sup> Rask Madsen, *ibid.*

<sup>48</sup> Shany, at 137.

to two primary factors in a court's engagement with a given legal norm: *source*—the legitimacy of a norm derives from the accepted authority of its source (eg a binding treaty, an uncontested norm of customary law); and *process*—the legitimacy of a norm relates to the process through which a norm came to be created and regarded as valid.<sup>49</sup> Legitimacy in this sense is content-independent: it depends not on the quality of the reasoning which it deploys, but on the authority that it can command qua institution. These criteria, reminiscent of Hart's 'sources thesis' and Kelsen's search for the ultimate *Grundnorm*, help to situate the legitimacy of a court within the legitimacy of a system.

There is a third criterion to assess the legitimacy of adjudication, namely, the *outcome* that it generates. The 'outcome legitimacy' of a norm applied by a court is classically content-dependent, and decouples legitimacy from the source of the norm or the process through which it was created. The outcome legitimacy of a judicial decision is dependent on whether a decision can be reconciled with certain standards of fairness and justice, or whether it may be seen as illegitimate for failing to comply with such standards. In this regard, the decisions of international courts do not depend then on the legitimacy bestowed upon them by having emanated from the international court, but rather, on the *effects* of the judicial decision itself and its conformity to certain standards. Although Shany has suggested that outcome legitimacy can serve to bridge questions of effectiveness on a practical level with broader notions of justice,<sup>50</sup> the present author would argue that outcome legitimacy is essentially instrumental. For this reason, although outcome legitimacy is to be balanced with source and process legitimacy, as described above, outcome legitimacy raises a tension with

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<sup>49</sup> *Ibid.*, at 141-2. An interesting edited collection on the topic of legitimacy in international law has been published elsewhere: see R Wolfrum and V Röben (eds), *Legitimacy in International Law* (2008).

<sup>50</sup> Shany, at 145.

Shany's 'goal-based' approach and Alter's 'normative politics' view that is never fully resolved.

#### **4 Empiricism and Evaluation: Concluding Remarks**

International adjudication is entrenched as a powerful institutional phenomenon in the 21<sup>st</sup> century: the proliferation of so many international judicial organs, taking on a dizzying array of different forms and exercising a vast range of competences, suggests that the phenomenon of international adjudication will not soon fade. Legal scholarship today is asked to assess how international adjudication influences and contributes to the development of contemporary international law. The three books under review represent efforts to quantify, measure and assess how international courts have done so; the authors have created and have applied ambitious conceptual frameworks to this effect.

The Oxford Handbook emerges as an indispensable resource for all those interested in international adjudication. It represents the distillation and refinement of great debates in the area and accommodates a diversity of approaches, ranging from the extremely pragmatic, to the forensically descriptive, to the lofty and theoretical. It is a wonderful addition to the Oxford Handbook series.

Shany remains primarily an international lawyer and Alter is a political theorist with a deep specialisation in international relations. Yet their long-standing collaboration not only in the specific form of the *Oxford Handbook of International Adjudication*, but also within the wider Project on International Courts and Tribunals, has served to inspire a similarity of approach and mindset that colours all three of these books. Shany's efforts to take seriously the exhortations towards effectiveness directed at international courts have led him to develop an ambitious goal-based analysis that proves successful in its application to a range of different institutions. Alter's goal, which is to find a way to measure accountability in

international law with respect to a wider range of stakeholders, and understanding how international judicial institutions are contributing to international law's transformation, has equally led her to develop a framework in which to assess whether international courts have genuinely altered politics; applied to both 'old-style' and 'new-style' international courts it produces important insights on the effectiveness of international courts on influencing politics.

Both authors belie a measure of modesty: despite their best efforts, both concede that assessing the effectiveness of international courts remains a difficult enterprise, and one which is highly context-dependent and cannot be conducted mechanically by quantitative studies of compliance statistics.<sup>51</sup> However, with that modesty also comes a strong measure of idealism, an idealism that requires critical scrutiny in the closing paragraphs of this review essay. As Alter seeks to explain in her conclusion, the endeavours of international courts to enhance their institutional legitimacy and to support the regimes in which they operate, and within which they have been delegated authority, are a powerful contribution to the entrenchment of the international rule of law.<sup>52</sup> Far from dislodging the democratic sovereignty that rests primarily within national governmental structure, a shift to international courts suggests an end to international autarky, to the idea that the short-term preferences and wishes of States should be preeminent. Instead, to Alter and also to Shany, international courts uphold international legal norms that signify higher values, such as the rule of law, the protection of fundamental human rights, and an entitlement to democracy which are set by the 'mandate providers' of the various international courts into their constitutive statutes, and transcend such interests. International courts are thus, if anything, a means of resistance to the unfettered exercise of power by States and governments, as international courts would be

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<sup>51</sup> See Shany, at 311; and Alter, at 344-45.

<sup>52</sup> Alter, at 336-7.

seen by Shany as safeguarding the longer-term political values embodied in their constitutive statutes, rather than merely short-term interests. The project embodied in these three books has sought to demonstrate, empirically, that this is a reality, and that international courts increasingly exercise power over the behaviour of governments and individuals, inducing them to comply with their judgments based in law.

An issue remains, one that Alter readily concedes in her concluding chapter: there is little reflection on the question of whether international courts *should* contribute to promote political change on the international level.<sup>53</sup> She is right to admit that ‘there is nothing inherently moral, just or legitimate about crafting multilateral agreements with the force of law.’<sup>54</sup> Whilst acknowledging this flaw, she unfortunately does not continue exploring this avenue. This omission may be forgiven, given that the scope and ambition of her entire book, not to mention Shany’s book and the Oxford Handbook they jointly edited, is in some respects to systematise and make intelligible the practices of international courts. It is safe to presume that the authors would not have undertaken such a project were they profoundly ambivalent as to the value of their work. To support legalisation and judicialisation of international society as a matter of faith takes on a different colour, in this sense; and the point must be made that with such an approach, international law, and with it, international adjudicatory processes are essentially instrumentalised as policy tools in the service of promoting certain values in global governance.<sup>55</sup> Such an approach does not challenge or provide a sufficient account for how power is exercised by judicial elites, and takes for granted that an effective contribution by international courts automatically facilitates the entrenchment of the international rule of law. To the extent that the authors seek to provide

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<sup>53</sup> Alter, at 359.

<sup>54</sup> Alter, at 359.

<sup>55</sup> As Alter herself concedes, at 364; see also Shany, at 14, who suggests that his goal-based approach puts out of bounds the desirability of the goals themselves.

resistance to existing structures of power, their preference for judicialisation institutionalises a preference for essentially incremental reform, and belies a continued faith that the legalisation of international society will inevitably bring with it positive change. Yet ultimately, despite this critique, this trio of books must be commended for presenting a coherent, principled approach to nudge international lawyers out of their traditional modes of analysis and reasoning. Their sheer breadth and ambition merits much praise and opens up an entire new array of questions for debate and for wider scholarly theorising; all deserve a place on the bookshelves of international law libraries.